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In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943.

No. 531

ELMER HARTZEL,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF OF ELMER HARTZEL, PETITIONER.

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The Opinions Below.

The opinion of the Circuit Court of Appeals is found in the Transcript of Record at pages 118 to 126 and is reported in 138 Fed. (2d) 169. (See Advance Sheet No. 3 of November 29, 1943).

In the District Court Honorable William H. Holly, trial judge, in passing upon the motions for new trial, filed a memorandum opinion which is found in the Transcript of Record, pages 101 to 109.

Jurisdictional Grounds.

The judgment of the Circuit Court of Appeals became final on November 10, 1943, on which date it denied defendant's petition for rehearing (Tr. 127). The Petition for *certiorari* herein was filed on December 10, 1943. *Certiorari* was granted on January 10, 1944.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of this Court governing criminal procedure. (U. S. C. A. Annual Pocket part, Title 18).

Questions Presented.

(1) Where, in a trial for publishing and disseminating articles with seditious intent, the documents were alleged to have been published with the specific intent to interfere with the enlistment service of the armed forces and to cause and attempt to cause insubordination, mutiny and refusal of duty in the military and naval forces; and where upon their face the articles have no reference whatever to the military forces or the draft, selective service, recruiting or enlistment, and no proof is made of any such intent or purpose in the defendant's mind, independent of the articles themselves, is the court warranted in submitting the cause to the jury, or the jury to find the defendant guilty?

(2) Is the constitutional right of freedom of speech interfered with by rendering judgment upon such verdict and imprisoning defendant upon such judgment?

(3) Was the province of the jury invaded and its function usurped by the Circuit Court of Appeals by its holding that a specific intent appears in the evidence, and that such question is for the jury, and, notwithstanding, affirming the judgment, when the record showed that the trial court had kept that very question from the jury by refusing to so instruct it upon request of defendant?

(4) Did the trial court err in refusing to instruct the jury that the acts charged were done with a specific intent in mind to commit the offenses charged in the indictment?

(5) Did the means of publication of the articles through letter to prominent personalities tend to show a specific intent to reach the armed personnel of the armed forces so as to cause mutiny, insubordination, disloyalty, or refusal of duty or be considered as a means of obstructing the recruiting or enlistment service of the United States?

(6) Did the court err in allowing in evidence articles written when we were at peace, then admittedly innocent and protected by the constitutional right of freedom of speech, where the issue developed was whether the same type of articles had become seditious because of a subsequent state of war coming into existence?

The Statute Involved.

Section 33 of the Espionage Act, under which the defendants were charged in the first six counts of the indictment, was originally enacted in 1917 and as then en-

acted was known as Section 3 and as it then stood, and as it now stands, was and is as follows:

> *"Seditious or disloyal acts or words in time of war.* Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. (June 15, 1917, c. 30, Title 1, § 3, 40 Stat. 219; Mar. 3, 1921, c. 136, 41 Stat. 1359.)

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in receiving improper evidence; in instructing the jury improperly and refusing to instruct the jury as requested.

The Circuit Court of Appeals erred in affirming the judgment.

Summary of Argument.

I.

Section 33 of the Espionage Act stands today as it was originally enacted in 1917. In 1918 Congress broadened the Act and in 1921 struck out all of the provisions by which the Act of 1917 had been broadened and reenacted Section 33 as it originally stood.

By these amendments, Congress evidenced an intention to punish only actual obstruction to the recruiting or enlistment service and to punish the actual causing of insubordination, disloyalty, mutiny or refusal of duty, and also to punish an attempt to cause insubordination, disloyalty, mutiny or refusal of duty.

It is contended that the Government failed to show by any evidence the successful accomplishment of the objectives alleged in the indictment, which leaves only one question before the court and that is whether the evidence shows an attempt to cause insubordination, disloyalty, mutiny or refusal of duty; that a criminal attempt is a crime having a specific intent and such specific intent must also be proved strictly as alleged; and the Government having failed to prove any such specific intent, has failed to prove that the defendant attempted to cause insubordination, disloyalty, mutiny or refusal of duty, and hence has failed to prove any crime.

II.

Where one, as here, is charged with sedition under Section 33 of the Sedition Act by preparing, publishing and

circulating allegedly seditious articles among available and eligible persons, intending thereby to induce such persons to fail and refuse to enlist or submit to registration; and with doing so with intent to cause, or attempt to cause, insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces to the injury of the service of the United States: and the documents do not show such specific intent upon their face and the Government does not introduce evidence to show that defendant circulated the documents with the criminal and specific intent inherent in the crime charged, then the crime charged is not proven, the presumption of innocence is not overcome, and reasonable doubt continues to exist.

Where an act is charged to have been done with a specific intent, and the act could be done with more than one specific intent in mind, it is not enough to prove the act and then ask the jury to indulge a presumption in order to find the specific intent in mind; as where an assault may have been made with various intents,—to rob, murder, rape, commit mayhem, larceny, etc., and a defendant, say, is charged with assault to rob and nothing further is proven than the assault; the very crime charged is not proved; and it is not proper to tell the jury to presume which intent was present in the defendant's mind as that changes the burden of proof, which always rests with the prosecution.

III.

There is no presumption that a defendant, when charged with seditious utterances, has gone beyond his basic right to freedom of expression; so where the Government has taken it upon itself to charge that he has so done, then it

must prove its allegation as it has laid it; for a defendant's constitutional right to freedom of speech is not to be taken away or denied by some presumption relied upon to take the place of proof. Hence the proof only that Hartzel wrote the articles and mailed them to certain persons proves just that and nothing more, for that has left the jury to presume an intent. When the charge is a crime with specific intent, presumptions are not to be indulged; proof is necessary. General intent to commit *a* crime is not sufficient; specific intent to commit *the* crime is essential.

IV.

The articles when examined contain no reference to conduct prohibited by the Espionage Act and criticism of public officials, however high, is not prohibited by law. Hartzel in writing his articles was looking at war in the abstract and not the specific war being waged. His viewpoint negatives the specific intent charged against him.

V.

The articles written before Pearl Harbor were innocent when written and had no tendency to prove intent to commit a crime under the law which became operative after the war status came into existence.

VI.

Where an act may be done with several purposes, such as assault with intent to commit robbery, mayhem, rape, larceny, etc., and the Government charges the given act was done with a specific purpose or intent, it is not sufficient to prove the act and stop, leaving it to the jury to

presume some intent, but the prosecution must go on and prove the particular intent it has charged. The jury may not presume, nor may the court require the defendant to prove anything.

The means charged is essential and material and must be proven as alleged. The court may not lessen the degree of proof resting on the Government to prove the crime charged nor give the prosecution a short cut to a verdict by way of a presumption.

VII.

The trial court would not definitely instruct the jury that a specific intent was an essential element of the crime, so the defendant did not have his day in court on that fact; and the Circuit Court of Appeals then held that such an intent was a jury question and yet affirmed the judgment; thus effectually taking from defendant the right of trial by jury.

STATEMENT OF THE CASE.

On December 18, 1942, the Grand Jury returned an indictment in the said District Court charging Elmer Hartzel, petitioner, one Elmer William Soller and one Newell Mecartney, with violation of the Espionage Act by preparing and publishing certain articles with intent to bring about conditions violative of Section 33 of the Espionage Act, and conspiring to do so.

The indictment contained seven counts, six of which charge substantive offenses and the seventh count charging conspiracy to commit the substantive offenses charged.

The defendants pleaded not guilty, were tried by a jury, and all were found guilty,—petitioner Hartzel upon all counts and the defendants Soller and Mecartney upon counts 5, 6 and 7.

On motion for new trial, defendant Newell Mecartney was granted a new trial and discharged.

Motions for directed verdict, motion for new trial and in arrest of judgment were denied as to Soller and Hartzel with exceptions and a bill of exceptions was settled and appeals perfected to the Circuit Court of Appeals.

On appeal, it was held that there was not suffiicent proof to sustain the judgment as to Soller and that he was entitled to have had a directed verdict, and the judgment as to Soller was accordingly reversed and he was discharged.

The Circuit Court of Appeals then affirmed the judgment as to petitioner Elmer Hartzel, and on petition for a rehearing the opinion and judgment were adhered to and the petition for rehearing was denied.

Hartzel is in the county jail of Cook County, Illinois, pending the decision here.

The Indictment.

The indictment charges violations of Sections 33 and 34 of Title 50, by this defendant, Elmer Hartzel, said Elmer William Soller and one Newell Mecartney.

The indictment contains seven counts, of which counts one to six are based upon alleged violations of certain

provisions of Section 33 of Title 50; count seven is based upon Section 34 and charges conspiracy to commit the substantive crimes set up in the six preceding counts.

The charges are based on the alleged preparation, publishing, circulating and distributing among persons eligible and available for recruiting and enlistment services in the military and naval forces of the United States, certain articles entitled (1) The British: An Inferior Breed (Govts. Ex. 2, Tr. 49); (2) The Jew Makes a Sacrifice: The Forthcoming Collapse of America (Govts. Ex. 3, Tr. 50; and (3) A document not named in the charges but afterwards known in the evidence as: The Diseased Spinal Cord (Govts. Ex. 15-A, Tr. 52), unlawfully, wilfully, knowingly and feloniously to cause or attempt to cause insubordination, disloyalty, mutiny and refusal of duty and to obstruct the recruiting or enlistment service of the United States to the injury of its service.

Counts 1, 3 and 5 charge, respectively, that, the United States being at war, the defendants did unlawfully, wilfully, knowingly and feloniously obstruct the recruiting and the enlistment service by preparing, publishing, circulating and distributing the said articles (one of which is named in each count) to available and eligible persons, which articles, it is charged, were, by defendants, intended to induce such available persons to fail and refuse to enlist, and to refuse to submit to registration under said Act for service in the military and naval forces of the United States to the injury of the service and contrary to the form of the statute, etc.

Counts 2, 4 and 6 charge in apt terms, respectively, also like acts and intentions to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty

in the naval and military forces of the United States by preparing, publishing, circulating and distributing the said respective articles, one of said articles being quoted in the preceding count and forming the basis of such count, to the injury of the service and contrary to the statute, etc.

Count 7, the conspiracy count, charges conspiracy among the defendants to violate the provisions of Section 33 of said Act, *i. e.*, that they did conspire to commit the offenses charged in the preceding six counts. Overt acts were charged.

There being now only the defendant Elmer Hartzel before the court the conspiracy count has lost its significance except in this that while all other defendants were let out, the judgment of conviction of Hartzel was affirmed as to all counts including the conspiracy count.

Statement of the Facts.

The facts out of which this prosecution arose are in substance as follows: The defendant Elmer Hartzel, prior to the entry of this country into its present war, composed certain articles of a controversial and political nature, which he mailed out to persons whose names and addresses appeared on a mailing list which he had prepared for that purpose. His mailing list was composed of headline personalities, prominent persons in the political, social and fraternal world, societies, organizations, etc., which he had largely gathered from newspapers, directories, almanacs, etc.

After Pearl Harbor Hartzel composed three articles of like nature which were mailed out in like manner, upon

which the first six counts of the indictment are based. Hartzel had his articles mimeographed at the shop of the defendant Soller, whose place of business was in the office of defendant Mecartney.

Hartzel had no connection with Soller except the business relationship. Soller had nothing to do with the composition or distribution of the articles. He printed them and received his pay. Soller sub-let space in a suite of rooms owned or controlled by Mecartney. Mecartney was, after verdict, held by the Trial Judge to be a by-stander and was granted a new trial, and discharged.

Life and Experiences of Elmer Hartzel.

To get the proper perspective of this case, we think it essential that we sketch for the Court the life and experiences of the defendant Elmer Hartzel; and this because the question of specific intent, or objective of the author must turn upon the character of the documents in question, the type of persons to whom mailed, and the viewpoint from which written. It is our thought that, when the whole record is looked at from this vantage point, there will be found in it a distinct negative of any intention to commit the crimes alleged against defendant Hartzel.

The defendant Elmer Hartzel was 51 years of age on September 9, 1943. He was born in New Castle, Pennsylvania. His blood lines are Scotch, Irish and German. His father and mother were each born on farms near New Castle, Hartzel's grandparents were born in Kingston, Pennsylvania. His people have been in this country since 1820, some one hundred twenty-odd years.

Hartzel started to school in his home town and he there received his grammar school education between 1897 and 1906, and took a preparatory school education at the Grove City Preparatory School at Grove City, Pennsylvania, from 1906 to 1909.

Between 1909 and the entry of our government in the World War in 1917, Hartzel followed several commercial or industrial occupations, including work for a wholesale butter and egg firm in Pittsburgh and as a switchman at Youngstown, Ohio.

Hartzel was among the first to seek enlistment in the World War in 1917. He could not make the Marines but succeeded in joining a unit being formed by the University of Pittsburgh for overseas service. He enter[illegible]d in the month of May, his number being an early one, Number 10,500. He received training at Allentown, Pennsylvania, and went overseas in September, 1917. He saw service in the University of Pittsburgh Base Hospital Number 27, doing X-ray work. While serving he was a candidate in the Artillery School, but before being accepted the war ended. He returned to the States in 1917 and was mustered out and honorably discharged at Camp Dix, New Jersey.

Between 1917 and 1923 Hartzel held various jobs, among them being employment in the Production Control Department of the Goodyear Tire and Rubber Company at Akron, Ohio, where he saw that the material flowed through the factory in an orderly manner and in the quantity wanted.

From the Goodyear Company employment at Akron, Hartzel entered service of the Akron City Health De-

partment where he worked for two years. While serving the City of Akron he obtained permission of the head of his department to enter the University of Akron, from which he graduated in 1923 with a degree of Bachelor of Science. In a retrenchment period, Hartzel, being the youngest member of the staff, was left off.

From Akron, Hartzel came to Chicago and entered the Chicago University, where he took undergraduate work and majored chiefly in economics and political economy. He studied in Chicago University until 1926.

After his course of study in the University of Chicago, Hartzel went to work for the National Bank of the Republic in Chicago, which was later merged with the City National Bank and Trust Company, as a financial statistician, a statistical man and investment adviser to the bank, where he remained until the end of 1927, when he went to New York to take further financial training. In New York he was employed for a period of six months by the Fitch Company, a publishing company, a financial analyst, and compilers of financial reports for The Analyst. After six months' service there he returned to Chicago to be married and has remained here since that occasion except as his employment took him out of Chicago. After his return to Chicago Hartzel wrote some articles for The Economist, a magazine published by the Chicago Journal of Commerce.

In September, 1928, Hartzel began employment with Kissel, Kennicut and Company on West Adams Street in Chicago as an investment analyst and remained there until that office was closed at the end of January, 1931, due to the financial crash of the period.

After the loss of employment in January, 1931, Hartzel could not obtain satisfactory employment and he stayed home and busied himself writing periodical articles which were published. Hartzel then obtained employment with the Department of Mines and Minerals of the State of Illinois at Springfield, but due to the current economy program the job was legislated out.

Hartzel then obtained employment with the Fernandi Company, investment brokers at Springfield, Illinois, and there worked until early in 1934 when that firm was dissolved and he returned to Chicago.

From 1934 to 1938 Hartzel worked in various jobs including one with the Cook County Bureau of Welfare doing statistical work at the Stockyard Station. He also worked in the library of the University of Chicago and did part time work in the Department of Philosophy of the University of Chicago and majored in philosophy and science. He also worked for Enyard-Van Camp, an investment company on La Salle Street, where he was assistant to one of the partners until it was dissolved.

In the interim Hartzel passed several federal and state examinations for civil service positions and took work in the Division of Unemployment Compensation of Illinois doing statistical and auditing work in the Merchandise Mart Building, where he remained until July 15. 1941.

In this period also, from 1934 to 1938, Hartzel did a lot of research work and wrote articles for magazines and journals, some of which were published, others not. Two articles from his pen appeared in the Accountant's Review published by the Association of University Accounts; an article for the University of Southern Cali-

fornia; one for Time in 1935; one for Harvard Business Review, and one for the University of Chicago published in its Journal of Business Economics.

Hartzel had passed some civil service examinations of the Federal Government for work as a financial economist and was on the assignment list. In 1941 he was called for emergency work in the auditing section of the United States Army Air Corps, in the civilian branch, a personnel of 5,000 employees. There he did auditing and was assigned to Detroit to work in the Packard Plant, where he worked until November, 1941; Hartzel then returned to Chicago to do personnel work in the Buick Motor Plant at Melrose Park, where his duty was to see that costs were kept according to required accounting procedures and remained there until February, 1942, when he was transferred to the Pullman Car Company at 103rd Street, South Chicago, where he continued in the same type of work, auditing books and verifying accuracy of records. He was in this employment when he was taken in custody on September 6, 1942.

How Hartzel Met Soller and Their Subsequent Relations.

In the spring of 1941 Hartzel was working in the Merchandise Mart in the Division of Unemployment Compensation of Illinois. He wanted to find a professional mimeographer adverse to war against Germany with whom he could contract (Tr. 57). The people who had been doing his mimeographing were not turning out satisfactory work and one of them had gone out of business. He wanted someone to do his work who would be near his place of employment. He had read in the paper about the German-American Alliance, which he supposed was

a kind of trade organization and which he thought would be opposed to Communism and might be opposed at that time to war against Germany (Tr. 80). We were not then at war. He went to the office of the German-American Alliance which was located on North Avenue within a couple of blocks of Halsted Street. He did not speak to any official of the organization, but merely spoke to two women who were working at that time in the office of the German-American Alliance and asked if they would refer him to some mimeographer that they knew. That was in May, 1941. They consulted a list in their office and referred him to the Reliable Letter and Addressing Service, 800 West North Avenue, which was operated by the defendant Elmer Soller (Tr. 58). Mr. Hartzel went to see Mr. Soller immediately and asked him if he would be in a position to do some work for him. Mr. Hartzel did not at that time have any article to be mimeographed.

Hartzel and Soller first met in the spring of 1941 at Soller's office and Hartzel stated to Soller that he had been recommended to him by the German-American National Alliance and inquired about his prices.

After Pearl Harbor Hartzel wrote and Soller mimeographed the three articles here in question from Hartzel's manuscript and Soller delivered the mimeographed articles to Hartzel for which he was paid his regular rate of charge.

Hartzel testified that he had no connection with Soller in the writing or distribution of his articles; that he had never conspired with Mecartney or Soller; that he was completely alone. He said, "I was completely alone and wanted to be" (Tr. 83, 84). Hartzel, in his statement said his wife gave him no assistance, and she so testified.

The Articles Set Out in the Indictment.

Three articles were set out in the indictment, upon the composition, printing and distribution of which the indictment is predicated. These three articles were composed, mimeographed and mailed out after Pearl Harbor. The article declared upon in Counts 1 and 2 entitled "The British: An Inferior Breed," and the article set up in Counts 3 and 4 entitled "The Jew Makes a Sacrifice: The Forthcoming Collapse of America," were written by Hartzel in the spring of 1942, mimeographed by Soller and mailed out by Hartzel in June, 1942. The article called "The Diseased Spinal Cord," portions of which are set out in Counts 5 and 6, was written by Hartzel in July, 1942, mimeographed by Soller and mailed out by Hartzel in August, 1942.

Hartzel, returning from Detroit in November, 1941, worked for a while in the Buick Plant at Melrose Park, a suburb of Chicago, and was then transferred in February, 1942, to the Pullman Company in South Chicago. In May, 1942, Hartzel had written the two articles which were entitled "The British, An Inferior Breed," and "The Jew Makes a Sacrifice: The Forthcoming Collapse of America," which Hartzel characterized as being short and intended to be mailed out together. They were mimeographed by Soller and Hartzel mailed them out within a few days after their receipt from Soller (Tr. 81). These articles, as before mentioned, were declared upon in Counts 1 and 2 and Counts 3 and 4 respectively.

The other article declared upon, portions of which are set out in Counts 5 and 6, was mimeographed by Soller for Hartzel, and is the one entitled "The Diseased Spinal

Cord." This mimeographed work was delivered by Soller to Hartzel at the corner of Michigan Avenue and Randolph Street outside of the Library Building, in Chicago. Soller received his pay for this work at the time of delivery. The explanation of this delivery at that point shows it to have been one of convenience only. Hartzel had moved to the far South Side in Chicago and the arrangement was made for delivery at that point of connection as Hartzel would use the Randolph Street Illinois Central Station and Soller could come down on the elevated from his office, which was considered a convenient method of delivery and connection (Tr. 81).

Articles Written Before Pearl Harbor.

The Court admitted in evidence, upon the theory that they were relevant to the issue of intent, seven pre-war articles composed by Hartzel, three of which were shown to have been mailed out prior to Pearl Harbor. These exhibits are as follows: Exhibit 60, "Revolution will come to America," composed in January, 1941 (Tr. 69); Exhibit 45, "Roosevelt's Illness," written early in 1940 (Tr. 63). The two other articles admitted were not shown to have been mailed out and no date of their composition was shown. These articles were Exhibit 46, "Roosevelt's Infantile Paralysis (Tr. 65) and Exhibit 47, "The Condition of Our Leader" (Tr. 68). These two last named exhibits, along with Exhibits 45 and 60, were found rolled up in a coffee can in Hartzel's trunk (Tr. 36). Exhibit 42 (Tr. 61) was found under the bathtub in Hartzel's home (Tr. 26).

Hartzel's Mailing List.

The defendant Hartzel had a mailing list of persons to whom he mailed out the several articles introduced here

in evidence. Hartzel commenced compiling this list of headline personalities in January, 1941, at the time he wrote the first article here in question. Hartzel said that he thought he saw war coming and wrote the article Revolution Will Come to America (Govt's Ex. 60, Tr. 69-75). He finally had a mailing list of 750 names, but at no time were more than 600 documents sent out (Tr. 79). This list consisted chiefly of prominent people, Congressmen, Representatives and Senators. The type of persons was prominent representative people. As time passed he began to eliminate a number of Representatives and Senators. Out of the World Almanac he got the names of patriotic societies such as Daughters of the Revolution, We the Mothers Mobilize, a list Hartzel considered patriotic organizations; it included fraternities, sororities and organizations of that type; the National Committee of America First, and of Frank J. Loesch, and bishops, and church representatives (Tr. 79-80). The names were compiled from various sources, names of prominent personages, such as associations and fraternities taken from the World Almanac; from a government publication containing a list of labor unions; persons engaged in the America First Committee whose names were in the headlines; American Legion, State and District Commanders whose names were taken from telephone directories at the Public Library, etc. (Tr. 59).

The envelopes that were addressed from Detroit were addressed by a public typist. The first article, Revolution Will Come to America, was mailed in envelopes addressed personally by Hartzel. In May, 1942, Hartzel purchased a typewriter and thereafter addressed his own envelopes; he also prepared the last three articles on this machine for use in mimeographing.

In the mailing out of these letters, Hartzel had no assistance (Tr. 60, 83, 84).

Persons to Whom the Articles Were Mailed.

The Government proved that the three articles declared upon had been received through the mail by certain persons and organizations, as follows:

1. The United States Infantry Association, publishers of the Infantry Journal, a service publication (Tr. 17).

2. Major General H. H. Arnold, Commanding General of the United States Army Air Force, War Department, Washington, D. C. (Tr. 18).

3. Joseph Huckins, Lt. Col. of the General Staff Corps, U. S. Army, San Antonio, Texas, testified to the receipt of articles in an envelope addressed to Colonel Hastings, Chief of the Military Intelligence Division (Tr. 18).

4. Franklin Bliss Snyder, President of Northwestern University (Tr. 18).

5. American Newspaper Publishers, 360 North Michigan Avenue, Chicago (Tr. 19).

6. Kiwanis International (Tr. 19).

7. Lions International (Tr. 19).

8. Air Line Pilots Association (Tr. 20).

9. American Legion Department of Illinois (Tr. 20).

The said documents or some of them were incidentally read or looked over by some persons who were connected with the above mentioned persons or organizations, and through whose hands they passed in the ordinary course

of their employment, and who were eligible for enlistment or draft or were already in the armed forces.

Court Refused to Instruct the Jury As to Specific Intent.

The indictment in this case sets out a special set of facts which are charged to have been accompanied with a special intent to accomplish a definite objective, to wit: the disruption of morale and the thwarting of enlistment.

It was contended below that the character of those allegations raised issues of *specific, actual, guilty* intent which the Government was bound to prove as laid; that it was not enough to say that a presumption could be indulged from the face of these documents and that from such documents defendants might be presumed to intend any natural and probable results of the language used; that in a criminal case a specific intent is not to be presumed from the wording of documents which on their face do not show a specific intent.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel by extraneous evidence that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting serv-

ice and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific, intention accompanied said acts" (Tr. 87).

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 91).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 98):

"It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination; that is a necessary element of an

offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 98-99).

In this we assert the Court erred and that our exception to the charge on the subject of intent should be here sustained.

Articles Written Before Pearl Harbor Erroneously Admitted in Evidence.

The Court admitted in evidence, upon the theory that they were relevant to the issue of intent, seven pre-war articles composed by Hartzel, three of which were shown to have been mailed out prior to Pearl Harbor. These exhibits are as follows: Exhibit 60, "Revolution will come to America," composed in January, 1941 (Tr. 56); Exhibit 45, "Roosevelt's Illness," written early in 1940 (Tr. 63). The two other articles admitted were not shown to have been mailed out and no date of their composition was shown. These articles were Exhibit 46, "Roosevelt's Infantile Paralysis" (Tr. 65), and Exhibit 47, "The Condition of Our Leader" (Tr. 68).

It is contended that the court erred in admitting in evidence the five articles written by Hartzel before Pearl Harbor over objection. They were irrelevant and incompetent under the issues.

Three of these five articles were written by Hartzel in the year 1941, namely "The Blood Sacrifice" (Tr. 81); "Roosevelt's Illness" (Tr. 63), and "Revolution Will

Come to America" (Tr. 69-75). These articles, together with two other articles, the date of composition of one of which is unknown, were admitted in evidence on the theory that they were relevant to the issue of intent; but, when they are read they show that if we had been at war when they were written and mailed they would not have been any violation of the sedition law. "The Blood Sacrifice" is an article devoted exclusively to criticism of the Jew. The article "Roosevelt's Illness", written in 1940 (Tr. 63), is a dissertation upon the well known illness of Mr. Roosevelt and interpreting that illness along psychological and political lines; "Roosevelt's Infantile Paralysis" is another psycho-political article; "The Condition of Our Leader" is a third article dealing with the psychology of the President as influenced by his physical condition; the article "Revolution Will Come to America" was composed in 1941. The court told the jury he had allowed them in evidence on the question of intent. The court said:

> "Some other documents have been admitted in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents here, mentioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army."

It was also contended that prior to the war status these articles were entirely within the constitutional privilege and the assumption of a war status did not make these documents competent to prove a felonious intent allegedly entertained in composing and mailing out other writings after the war began; that if they were innocent compositions when written they were innocent when admitted and shed no guilty light upon subsequent events.

The Circuit Court of Appeals Invaded the Province of the Jury.

The trial court having refused to instruct the jury as to the question of specific intent (Tr. 87, 98), the affirmance of that judgment by the Circuit Court of Appeals decides that there was a specific intent, thus deciding a question withheld from the jury by the trial court and a question which the law has entrusted exclusively to the judgment of the jury.

ARGUMENT.

I.

The Government Failed to Show By Evidence the Successful Accomplishment of the Objectives Alleged in the First Six Counts of the Indictment and Failed to Show Any Attempt to Cause Insubordination, Etc., As Alleged in Counts 2, 4 and 6 of the Indictment, and Hence Failed to Prove a Crime Committed.

Section 33 of the Espionage Act, under which the defendants were charged in the first six counts of the indictment, was originally enacted in 1917 and as then enacted was known as Section 3 and as it then stood, and as it now stands, was and is as follows:

> "*Seditious or disloyal acts or words in time of war.* Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. (June 15, 1917, c. 30, Title I, § 3, 40 Stat. 219; Mar. 3, 1921, c. 136, 41 Stat. 1359.)"

On May 16, 1918, Section 3 (now Section 33) was amended and by enlargement broadened to include a number of other types of conduct which the Congress punished with the same penalty as in the original section. But certain changes were made in Section 3, indicative of congressional intention, which should be held in grasp when studying the Act as it now stands.

After the World War had ended, the Congress, in 1921, repealed Section 3 as it then stood upon the statutes (41 Stat. 1359) and restored and revived Section 3 as it was originally enacted in 1917 (40 Stat. 219); and as enacted in 1917, Section 3 was in the identical words as now found in Section 33 upon which this indictment is based (Sec. 33 Title 50 U. S. C. A.) These changes have to do with the subject of criminal attempts, and are important in studying the text of the law itself as well as the decisions in World War I cases, some of which were for violations of the Act of 1918, and for offenses not now found in the present Section 33.

These changes in the Act are important for the reason that some of the leading cases were decided under the Act of June 15, 1917, and others under the Act of May 16, 1918.

Changes Made By the Act of May 16, 1918.

By the Act of May 16, 1918, that portion of Section 33 (then sec. 3) which now reads:

> "Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States,"

was amended to read as follows:

> "Whoever, when the United States is at war, shall willfully cause or attempt to cause, *incite or attempt to incite* insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States."

It will be noted that the words, "incite or attempt to incite" were added during the exigencies of that war

period and, in light of the experiences of that day, those words were dropped from the enactment in 1921.

The Congress also enlarged that portion of Section 33 which then, as Sec. 3, read:

> "Or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States"

by making it read as follows:

> "Or shall willfully obstruct *or attempt to obstruct* the recruiting or enlistment service of the United States to the injury of the service of the United States."

It will be further noted that the Congress, in amending this section in 1918, included the words, "Or attempt to obstruct," and in light of experience of the day, struck out that phrase when it revived and restored Section 33 as it was originally enacted.

For convenience we break down Section 33 so far as is here material into its several elements by paragraphing it so as to get them readily into the eye. As broken down it is as follows:

> *Par. 33. Seditious or Disloyal Acts or Words in Time of War.* (1) * * * ; and
>
> (2) Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States; or,
>
> (3) Shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States,
>
> shall be punished by a fine of not more than $10,000, or imprisonment for not more than twenty years, or both.

Thus we visualize the distinctive crimes created by Section 33; the first refers to false reports; the second, causing insubordination and mutiny in the armed forces or attempting to do so; and the third obstructing the recruiting and enlistment service. It is obvious that those three crimes are distinctive and separate offenses.

The Scope of the Section.

Section 33 was no doubt intended to give comprehensive protection to the military structure and war effort during war periods. In brief, the war effort is protected against propaganda, destruction of morale, and interference with increase of personnel.

Only the second and third designated crimes are here involved.

The second field embraces the spirit and morale of the military or naval forces; and this, of course, must refer to the inducted personnel of the forces as there can be no mutiny or insubordination, disloyalty or refusal of duty until the oath is taken and the party has passed out of civilian status and into the discipline of military service. The oath is the end of civilian status and the commencement of that of a soldier, (*In re Grimley*, 137 U. S. 140.)

The third field covers civilians eligible for war service and from which field the new units of the armed forces are selected or recruited, but who have not been inducted into the service.

Following the third provision of the statute is the provision "to the injury of the service of the United States,"

which from its context appears to refer to the second and third crimes created by the section and upon its face means that unless the war service is injured there is no crime; that there is no crime except in accomplishment of the objective, except the provision covering attempts to cause insubordination, etc.

We think the addition of the words "attempt to obstruct," to the section in the Act of May 16, 1918, and its omission by the revival of the section on March 3, 1921, so as to return it to the exact wording in which it was originally phrased, has a distinct significance which should be called to attention. It emphasizes the idea that these provisions cover separate fields of objectives and have no overlapping areas; that the mailing of the documents must have been shown by proof to have in fact created an obstruction to recruiting and enlistment; that as to causing insubordination, disloyalty, mutiny or refusal of duty, it must have been shown as an accomplished fact, if it were a fact; or shown as an attempt, if in fact, there were an effort made which failed to merge into accomplishment.

And we think also that the failure of Congress to originally use the word "attempt" in this portion of the section, putting it in at a later period of time, and leaving it out in a still later amendment, indicative of legislative intent that the section should be construed strictly as written. Where the Congress puts a heavy penalty upon any one who "shall wilfully obstruct the recruiting or enlistment service of the United States" it seems that it was intended that that penalty should follow upon the accomplishment of that objective and upon *accomplishment* only. "Shall wilfully obstruct" means that an indictment will lie when the defendant shall have wilfully obstructed, that is when he shall have accomplished the objective, in the past perfect tense.

Certainly it cannot be a proper construction of the Act to say that defendants created a situation out of which such an obstruction to recruiting or enlistment *might* flow. Such a construction flies in the face of the words of the Act and obvious legislative intent. Presumptive injury is not penalized by the statute, nor even remote injury. Only accomplished wilful injury is punished.

This idea is emphasized when we look at the other clause which says that any one who shall cause *or attempt to cause* insubordination, disloyalty, mutiny, or refusal of duty, shall be fined not over $10,000 nor imprisoned more than twenty years or both. Here there is an actual differentiation between an objective accomplished and an objective attempted. For each the Congress has provided the same penalty. Fine and imprisonment for an unsuccessful effort; fine and imprisonment if the objective is attained and insubordination, disloyalty, mutiny, or refusal of duty has been actually caused in the service. A defendant is punishable only when he shall have caused,—past perfect tense,—or attempted. Certainly it cannot logically be said that Congress could have meant that a person should be visited with those penalties if he merely created a situation out of which insubordination, disloyalty, mutiny, or refusal of duty could *possibly* grow. That is not the language of the law and it is not the plainly expressed intent of the Congress as appears in this law. Insubordination, disloyalty, mutiny and refusal of duty might spring from many conditions. It is only when wilfully caused or a wilful attempt is made to cause them that the law applies a penalty, that is, where a substantial injury to the service has resulted or was attempted.

The Government Did Not Prove the Accomplishment of Any Crime.

Now the Government made no effort to prove that any injury to the United States followed upon the mailing of the articles in question; and there is an entire absence of proof of any facts that would tend to show that under Counts 1, 3 and 5 defendants did, as an accomplished fact, obstruct the recruiting and enlistment service of the United States in any manner or by any means.

Nor did the Government under Counts 2, 4 and 6, prove by any facts that the defendants caused any insubordination, disloyalty; mutiny or refusal of duty by any person in the armed forces: There is an entire absence of any evidence or proof of any result or consequence of the mailing of the documents in question. So far as the service was concerned, it was not shown to have been affected in the least.

No reaction by any person or group to the articles was shown by the Government except that they were sent to the Federal Bureau of Investigation.

The Case Hinges Upon "Attempt".

Now the foregoing demonstrations show that the Government did not prove the charges in the first six counts of the indictment unless it be said that there was proof under Counts 2, 4 and 6 of an *attempt* to cause insubordination, disloyalty, mutiny or refusal of duty. This leads to a study of the subject of criminal attempts.

Now the language of the statute is:

> "Whoever, when the United States is at war, shall *wilfully* cause or *attempt to cause* insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States * * * shall be punished by a fine of not more than $10,000 or imprisoned for not more than twenty years, or both."

The question here is what constitutes a *wilful attempt* to cause the indicated reactions of the forces.

Wilfulness is said to be a stubborn purpose to do a certain thing; a determination to see a thing through to the bitter end. It is affirmative action, definitely not negative.

A criminal attempt is an affirmative moving action accompanied by an intention, actual and specific, to accomplish a given purpose, do a certain thing, or reach a certain objective, and it must have *failed.* The intention must be *specific;* it cannot proceed from a *negative* mind; it has nothing to do with natural and probable consequences; the objective must be *fully visioned* and the accused must make an *effort;* he must do some overt act to carry out his intent; he must try, and *wilfully try,* to accomplish it, and fail in the attempt. If the attempt is successful, it merges into the accomplished crime and is no longer an attempt, but is then an accomplishment, a thing done.

Now there was no proof made by the Government that the defendant had in mind or visioned as an objective the disorganization of the forces of the United States when the articles were composed, printed or mailed. And there being an absence of any such proof in the evidence, no attempt to cause was proven and obviously, without proof of such an intent in mind, and a wilful purpose with it, there could be no attempt.

There was no effort to reach the armed forces or the personnel thereof. The effort was toward entirely different groups or types of persons. The method of selection of the names of persons on the mailing list negatives any intention to make any effort to reach and influence the armed forces.

The proof did not tend to show that insubordination, disloyalty, mutiny, refusal of duty in the military and naval forces of the United States was the objective of the articles in question. There never was, either before or after Pearl Harbor, any effort to reach the personnel of the armed forces through the mailing list of headline personalities.

The tendency of the evidence is to the contrary.

Again there is doubt whether mailing such communications under seal to persons of intelligence imports any intention in mind of the author that the expressions of opinions or ideas in the document shall carry on and on until they shall engulf and create disruption and breakdown of the morale of the armed forces: Obviously no such indirect method was contemplated. Any such thought must rest upon presumption and specific intent is not provable by presumption.

The Government failed to prove either an attempt or an accomplished objective and hence failed to prove a crime.

II.

Where the Article Charged to Be Seditious Shows No Specific Intent Upon Its Face Its Publication Alone Does Not Violate the Act.

It is our contention that where nothing appears upon the face of the articles showing a specific intent to com-

mit the crimes charged and no evidence is introduced by the Government to show the criminal and specific intent, inherent in the crime charged, such crime is not proven; and that the presumption of innocence is not overcome, and reasonable doubt still exists; and that the true rule is that where on the face of the circulated document no specific intent appears to commit the very crime charged and no proof is made otherwise by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and, when proven, it supplies no evidence of intent.

In the leading cases which have reached this court, the specific intent appeared in the language of the written documents, which together with proof of the mode of distribution and the persons among whom distributed was held to support convictions.

We analyze those cases for purposes of illustration.

In the first three cases reaching the high Court, all argued in January 1919, there was no dissenting opinion. All three of these cases, *Schenck* v. *U. S.*, 249 U. S. 47, *Frohwerk* v. *U. S.*, 249 U. S. 204, and *Debs* v. *U. S.*, 249 U. S. 211, were affirmed and Mr. Justice Holmes wrote the opinions of the Court in all of them, and in the *Schenck* case stated a general rule by which to decide such cases which we hereinafter quote. First we will analyze those three cases.

In the *Schenck* case (arising under the Act of June 15, 1917), the medium used for distribution of statements was leaflets in which there was specific reference to the draft, stating, among impassioned utterances, that: "A conscript is little better than a convict", and that conscrip-

tion was "despotism in its worst form"; and the class of persons among whom the leaflets were distributed was men who had passed exemption boards, drafted men. In the *Schenck* case the Court laid down the general rule for the decision of such sedition cases, as follows:

> "The question in every case is whether the words used were used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent. It is a question of proximity and degree." (p. 52).

In the *Frohwerk* case the medium of distribution was the Missouri Staats Zeitung, a newspaper published in a metropolitan center, and the articles therein, on which the charges were based, bore upon their face specific reference to the draft service and resistance to it. There was no bill of exceptions (*Ex parte Frohwerk*, 248 U. S. 540), to show excusing circumstances, so the case was decided upon the nature of the medium used, the persons possible to be reached by that medium, and the character of the articles published. The court visioned possible defenses (p. 208), but as they were not in the record the case was affirmed with the hesitating statement, and apparently against mental inclination, that:

> "We are driven to the conclusion that the record shows no ground upon which the case can be reversed." (p. 210).

In the *Debs* case the medium of communication was a public speech to a concourse of people in which Debs openly advocated resistance to the draft and praised and sympathized with others who had been convicted and imprisoned because of resistance to the draft. Again, Debs addressed the jury in his own behalf, and reiterated his public statements in challenging terms, to the distress of

his counsel (p. 215). So, the medium of communication being ample, and the statements openly obnoxious and defiant, the Supreme Court affirmed the judgment.

All three of the cases, *Frohwerk, Schenck* and *Debs*, were affirmed,—the *Frohwerk* case, because there the articles referred to the draft in a derogatory manner and there was no bill of exceptions; the *Debs* case because Debs stood before his jury and defiantly iterated, reiterated, and affirmed his seditious utterances leaving the Court helpless to aid him; and the *Schenck* case because the documents circulated called conscription a monstrous wrong and advised the persons circularized,—men who had passed exemption boards, to assert their rights and not to submit to intimidation.

But out of these cases is to be drawn these essentials,—that the document must be of such nature that it is calculated to create the injury prohibited; the means of circulation must be ample to reach the class of service men or draftees, and the persons reached must be the type on whom the statements would react "to the injury of the service of the United States", for it is clear the law is not aimed at isolated cases, but at causing insubordination, etc., in the "*forces*", and obstruction to the "recruiting or enlistment *service*".

And the intent must be proven directly or by circumstances,—not presumptions.

The Cases in Which Dissenting Opinions Were Filed.

After the unanimous opinions in the three cases, *Schenck, Frohwerk* and *Debs*, were filed, there arose three other cases, *Abrams* v. *U. S.*, 250 U. S. 616, *Schaefer* v.

U. S., 251 U. S. 466, and *Pierce* v. *U. S.*, 252 U. S. 239, in all of which Justices Brandeis and Holmes filed dissenting opinions. A study of the majority and minority opinions in these cases furnishes a true rule for decision of this case which is, as we deduce it, that specific intent is sufficiently proven if that intent appears upon the face of the document by direct references to the draft or enlistment service in a derogatory manner sufficient to cause clear and present danger that the evil Congress sought to avoid will arise. Otherwise not.

In the case of *Abrams* v. *U. S.*, 250 U. S. 616, a conspiracy case, in which the indictment was predicated solely upon the leaflets (p. 624), the Court in its majority opinion stated that:

> "Men must be held to have intended and to be accountable for, the effects which their acts were likely to produce." (p. 621).

In conspiracy the *effect of the acts* is not the basis of decisions as we all know, so the language used in the opinion must be looked at in its setting, and not taken generally, as a rule of decision. The majority opinion there held:

> "• • • • the plain purpose of their propaganda was to excite at the supreme crisis of the war, disaffection, sedition, riots and, as they hoped, revolution, in this country for the purpose of embarrassing, and if possible, defeating the military plans of the Government in Europe" (p. 623).

And the Court said:

> "Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established" (p. 618).

The Dissent of Justice Holmes.

Now the dissent of Justice Holmes, joined in by Justice Brandeis, was predicated essentially, at least largely upon the ground that no *specific intent* had been shown to have been in the minds of the accused to accomplish the *objectives* charged; whereas the majority had held that upon the face of the documents the objective was clear; and that was what the quote from the majority opinion referred to when it said men were to be held to the consequences their acts might produce.

Now in the *Abrams* case Justice Holmes points to the absence of proof of specific intent. He said:

> "But to make the conduct criminal the statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war'. It seems to me no such intent is proved" (p. 626).

The Justice then went on to expound the doctrine of *specific intent*. He said:

> "I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge, at the time of the act, that the consequences, said to be intended, will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law, might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow whether he, individually, could foresee them or not.
>
> But when the words are used exactly, a deed is not done with intent to produce a consequence, unless, that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the conse-

quence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind" (pp. 626-627). * * * "Congress certainly cannot forbid all effort to change the mind of the country. Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so" (p. 628).

Now the majority opinion of the Supreme Court in the *Abrams* case did *not say* that the doctrine of specific intent did not apply to such cases, but, what it necessarily *held* was that the rule that specific intent must be shown was *satisfied* by the expressions on the face of the papers, quoted in the opinion, such as:

"Workers of the World, Awake! Rise. Put down your enemy and mine. * * * Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that not only the Russian Worker fights for freedom but also here in America lives the spirit of Revolution. * * * Workers up to fight." (pp. 620-622.)

While the minority opinion to the contrary was that a specific intent did not sufficiently appear in the language so as to accomplish the particular criminal objectives charged in the indictment.

Thus we see that the dispute in the *Abrams* case was over the **application of the rule** as to specific intent and not over the rule itself. The rule itself was conceded.

In the case of *Schaefer* v. *U. S.*, 251 U. S. 466, there was a dissenting opinion by Justice Brandeis joined in by

Justice Holmes. The majority opinion held that the articles published in the Philadelphia Tageblatt, there in question, upon their face showed the intent charged in the indictment. Such expressions in headlines as "The Failure of Recruiting" and statements that an "advertising campaign was worked at high pressure" and that "all sorts of means were tried to stir up patriotism", but that "the recruits did not materialize" (p. 480). But the dissenting Justices did not see in the documents the "clear and present danger" rule announced in the *Schenck* case.

In *Pierce* v. *U. S.*, 252 U. S. 239, there was also a dissenting opinion by Justice Brandeis concurred in by Justice Holmes. The case involved the distribution of a pamphlet entitled "The Price We Pay". In Baltimore, District Judge Rose had ruled its circulation was not illegal and discharged the accused by a directed verdict. The distribution of some 5000 copies was then made by persons in Albany among whom was Pierce. It was held by the majority opinion:

> "It was shown without dispute that the defendants distributed the pamphlet—The Price We Pay—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution" (p. 249).

Thus the majority opinion is founded upon the idea that the specific intent appeared upon the face of the document itself (p. 249), which openly denounced the drafting and recruiting of sons when they grew up to soldier size, and age after age, mounting up and up (pp. 245-246). That this was so is emphasized by the statement in the minority opinion that "the leaflet is unaffected by extraneous

evidence which might give to words used therein special meaning or effect'' (p. 256).

The dissenting opinion further said concerning the charge that the defendants conspired and attempted wilfully to ''cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces'' that:

> ''No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.
>
> ''A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces'' (p. 273).

The Lesson to Be Learned From the Conflict of Opinion in Sedition Cases.

Out of the several Supreme Court cases cited on hearing counsel it is thought this much is obvious: That the majority of the Supreme Court were of opinion that where, upon the face of the writings distributed, there appeared specific references to the draft and recruiting, advising resistance, etc., that was evidence of specific intent; which, instead of militating against the proposition and opinion we have here advanced really, and in fact, sustains our point of law made here that where nothing appears upon the face of the paper pointing to the crime charged and no evidence is introduced to furnish the criminal and specific intent, inherent in the crime charged, the crime is not proven; the presumption of innocence is not overcome, the reasonable doubt still exists.

We respectfully suggest that the true rule is that where on the face of the circulated documents no specific intent appears to commit the very crime charged and no proof is made by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and it supplies no evidence of intent.

The trial court should have directed the jury to find a verdict for defendant for failure to prove the crime as alleged.

III.

The Government Failed to Prove the Issues It Created in Its Indictment and Defendant's Right to Freedom of Speech Under the Constitution Was Invaded By the Conviction.

We commence this section with the suggestion that statements used in writings are protected by the freedom of speech provision of our Constitution up to the point where tolerance must end and self-preservation must begin; where government must assert its paramount right to its life and existence; to a point where, as has been said, a citizen creates a danger clear, present and imminent.

If, upon their face, such writings as are here in question are equivocal and indecisive, the presumption of innocence and reasonable doubt safeguard the defendant until the Government shows by extraneous proof that acts of the defendant, taken in connection with the documents, have created a clear and present danger.

There is no presumption that a defendant has gone too far in exercising his basic right to freedom of expression.

The Government must prove its allegation, when it so alleges, that he has exceeded his constitutional allowance of liberty and prove that fact beyond reasonable doubt.

The Charges Should Be Proven As Alleged.

Where writings are not clearly and unmistakably seditious, proof *dehors* the instrument is required to support the charge that they are and that the writings were published and circulated to effectuate the seditious intent alleged; otherwise there would be no constitutionally protected right to expression; otherwise it would cast the burden upon the citizen to prove he was within the constitutional protection instead of upon the Government to prove he had gone beyond his constitutional guaranty.

The documents declared upon, do not, upon their face, contain any reference to the recruiting, enlistment or draft whatever. There is only expression of racial criticism, political opinions, expressions concerning governmental policies, and derogatory remarks but not one word advocating resistance to draft, discouraging enlistment or recruiting, counseling insubordination, disloyalty, mutiny or refusal of duty.

There is not upon the face of these documents any indication of an affirmative effort or intention to obstruct the war effort as such.

Nor is there in the article any exhortation to eligible persons; nor pleas to induce those already inducted into the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did

the Government attempt even to prove an attempt to do so.

The documents, not furnishing, in and of themselves, positive and conclusive evidence of such obstruction of recruiting and enlistment service, or attempt to destroy morale, proof of such objectives must be found, if at all, in the record otherwise made by the Government.

But the Government proved only that the articles were mailed to representative persons in the public headlines and to societies, unions, clubs, papers and officials of Congress, etc., and that such people and organizations were the elements or stratum of society into which the documents were sent.

There was no proof made that the articles were distributed among the armed forces or among that group of youthful persons especially eligible for the selective service or persons eligible to enlist in the service, with animus and intent to stall the recruiting service or break down the morale of the armed forces.

Hartzel's Mailing List Was Headline Personalities.

The statement taken from Hartzel by F.B.I. Agent Carroll (Tr. 75-81) shows in what manner Hartzel made up his mailing list and the types of personages to whom his writings were sent. He obtained his names from various sources. From World Almanac he obtained the names of various prominent personages, associations and fraternities; from a Government list, certain labor unions; from newspapers, the names of persons engaged in America First Committee activities; from telephone directories, the names of State and District Commanders of the

American Legion; and he mailed to such organizations as Daughters of the American Revolution and We the Mothers Mobilize (Tr. 79). His mailing list of 750 was made up mostly of prominent people and a large portion were sent to congressmen, senators and other representatives. The type reached and intended to be reached was prominent, representative people (Tr. 126). The proof on this was affirmative and no other indication is in the record.

Defendant did not look for the roll calls of the forces for his names.

In making its proof, the Government proved that Hartzel had mailed his articles to the United States Infantry Association, publishers of the "Infantry Journal," the Major General of the United States Army, Chief of the Military Intelligence Division, the President of the Northwestern University, the American Newspaper Publishers, Kiwanis International, Lions International, Air Line Pilots Association, American Legion Department of Illinois (Tr. 19-22). These are, of course, a select list and the army officers or employees were brought to court to testify to receipt of the documents. But it all adds up to a list of top ranking personages, heads of movements, and political and social organizations, which disproves the allegation that the articles were directed toward obstruction of the war effort by specifically circularizing those persons inducted into the armed forces and persons eligible therefor.

There was no proof of a specific circulation of the articles among eligible draftees, or volunteers, or those already inducted, nor that such was intended; so that the record speaks that there was no specific or actual

intent to obstruct recruiting or enlistment or destroy morale in the manner or method of distribution of the articles.

The fact that after reading the articles, some one may have incidentally turned away from volunteering, or a member of the armed forces have gone A.W.O.L., is not the test. Such action might result from the most innocent statements of any one or some special urge; but that is not the test; the law is only violated by wilfully obstructing the recruiting or enlistment service, or wilfully causing or attempting to cause the breakdown of morale, of which the Government made no proof. Injury to the *service* of the United States is the language of the law.

We think the words of Mr. Justice Holmes, found in the *Abrams* case, may well be noted here and could as well have been written concerning the documents now before the court in this case:

> "Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." (p. 628)

And may we add that the writer of the opinion in this case in the Circuit Court of Appeals expresses the same thought:

> "It may be, we hope it is a fact, that there are few if any persons in this country so naive as to place any credence in the articles complained of, and it may be no great harm resulted from their publication." (Tr. 124)

Nor is there in the articles any exhortation to eligible persons; nor pleas to induce those already inducted into

the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did the Government attempt to prove an attempt on the part of defendant so to do.

The result is that the defendant was convicted for having written and mailed the articles; for the *act* not the *intent* with which the act was done; for no intent, general or specific, to do injury to the military or war service of the United States in the manner charged was shown to have been in Hartzel's mind when he penned the articles and mailed them out. Wilfulness and the evil intentions alleged, were not proven, and without them no crime was proven.

Without proof of a wilful purpose,—which means an affirmative, stubborn intent and purpose existing in the mind to cause insubordination, disloyalty, mutiny or refusal of duty, or to wilfully obstruct the recruiting or enlistment service,—the law cannot be said to have been violated. The Government did not show such a condition of mind. Hence it showed no crime.

A General Intent Is Not Sufficient. Specific Intent Is Essential.

If the Government here contends, as it has heretofore, that a presumed intent, *i.e.*, that a person is presumed and bound to intend natural and probable consequences of his acts, is all that is necessary to prove the intent here alleged,—a wilful felonious purpose, then we reply that the Government proved no actual consequences and the argument is sophistry. Effect must be shown before a cause can be said to exist or become material. If there

are no consequences, no effect, no cause can exist, all of which is axiomatic. Cause and effect exist together, not separately.

There can be no question but that the very essence of a *criminal attempt* is an existing *specific intent*. (16 Corpus Juris 113.) To attempt is to specifically intend, and try.

The allegation that insubordination, etc., was wilfully caused and recruiting, etc., wilfully obstructed, includes a specific intent; and the allegation that the articles were prepared and mailed with a certain named intent, purpose and objective is not satisfied by *presumptive proof*, for it alleges an affirmative active thing,—a specific intent.

A defendant's constitutional right to freedom of speech is not to be taken away by some technical evidentiary presumption relied upon in lieu of proof.

Therefore we conclude that the Government proved only that Hartzel wrote the articles and that they were sent to certain persons, and no more; and that the Government therefore failed to show facts sufficient to take the case into the field of apparent danger clear and imminent, and which only would overcome the right of defendant to that quantum of freedom of speech and press guaranteed by the First Amendment to our Constitution.

For the error in refusing to direct the jury to find defendant not guilty, the judgment should be reversed.

IV.

The Articles Set Out in the Indictment Contain No Reference to Insubordination, Etc., Nor to Enlistment Nor Selective Service and the Printing and Distribution Was No Violation of Section 33.

An examination of the three articles set out in the indictment reveals that there is not a word of reference to the selective service, enlistment, or volunteers or soldiers, sailors, marines, air corps or war personnel. There can be found therein no exhortation to any one in the service to get out or refuse duty or become disloyal or insubordinate or mutinous, or to stay out.

The whole scope of the articles is political or philosophical or critical of elements of society or government in action. There is not a thought of interference with the war effort. If mailed promiscuously they would not create the conditions charged as criminal in the several counts.

A man under our system of government does not lose his citizenship when he accepts the status of soldier. He is still the normal human that he was. Just because he is in the armed forces is no sign that he does not have the normal resistance that he had before entry therein. These articles would not injure any military man. Far from being influenced by the articles in question, all of the persons who testified here sent them to the F. B. I.

The article, "The Jew Makes a Sacrifice," is clearly an anti-Semitic article and has no reference to selective or enlistment service or soldier morale. No matter where sent or to whom they could not influence disloyalty or mutiny in a normal mind or have any other such influ-

ence as is alleged. And the same is true of the article, "The British: An Inferior Breed."

The same may be said about the facts stated concerning the President and the opinions stated, and political discussions, found in the article "The Diseased Spinal Cord"; they do not bear upon or typify the evils Congress sought to reach in Section 33; not remote political matters but direct and positive acts of a wilful nature interfering with the war man power is punished.

Mere talk about the President or other high official has not been made criminal by Congress. In *U. S.* v. *Hall*, 248 Fed. 150, 153, the court said in discussing language far more caustic than we have here:

> "Congress has not denounced as crimes any mere disloyal utterances nor any slander of the President or any other officer of the United States."

To the hands of whomsoever these articles might come there was in them no thought of solicitation, or exhortation to disloyalty or interference with the gathering in by the Government of her man power.

It Was War,—War in the Abstract That Hartzel Combatted.

In studying this view of Hartzel's activities, sight should not be lost of his historical background and his own war record. Hartzel comes from native born parents and grandparents out of the Pennsylvania melting pot of sturdy races, Scotch, Irish and German; in what proportions he did not say, but as his name comes in the male line from German ancestry, it is apparent that a mother and grandmother were Scotch and Irish. His

people have been here since 1820. Hartzel was among the first volunteers in the World War. Failing to get in the Marines, he was taken in the Pittsburgh University Hospital organization, went overseas in September, 1917, where he remained engaged in X-ray service till 1919, when he returned to the States and was honorably discharged. He had been a candidate for a commission in an artillery school overseas but peace broke before his acceptance.

Hartzel saw the distressing by-product of war as the wounded passed through the hospital incapacitated, many for life. He experienced the effects of the demobilization of an army on post-war life and industry. He educated himself to ride the wave of success in statistical work in production and economy. The depression engulfed us. Hartzel saw one enterprise after another, in which he was working, collapse in the period of depression. He took up civil service to obtain a livelihood. Statistically and research minded, he wrote articles widely published. He saw the recession ride in upon us as a backwash of the depression or its attempted cure.

He felt its surge against his efforts to produce the necessaries of life, the keen competition of others that seemed crowding him out of the center of plenty to the edge of the circle of scarcity. From bitter experiences he began drawing social and political deductions and putting them on paper. Hartzel said that he thought he saw war coming in January, 1941, when he wrote Revolution Will Come to America, and commenced preparation of his mailing list (Tr. 79). The rest of the story we have discussed.

But it all adds up to make the thought that what Hartzel was combatting was another era of war, physical suf-

fering, inflation, depression, recession, human misery, the vicious cycle out of which human experience has never taught us the way of escape, for each generation is a law unto itself and insists upon the right to make its own mistakes, if mistakes they may be considered in the long view history.

It was war, war in the abstract, that Hartzel talked against, not the prosecution of the specific war in which we are engaged. And though we may not agree with his philosophy we must protect his right to express it.

Hartzel Stated His Motive.

On the witness stand in his own defense after specifically denying any intention to commit the crimes charged, he was asked (Tr. 82-83):

> "Mr. Rankin: Will you state to the court and jury what was your intention then in writing and distributing those articles?
>
> Mr. Hartzel: I always regard my work as from a statistical standpoint and business, and also taking the war aspect, I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races, and rather than have it beat into us, we might as well face the facts and know what we were facing, a certain group of Communists discussing methods, their viewpoints, I wanted to help minimize that so we could again have public standpoint established in this country. I am not in here because I am disloyal, and I have no prison record, but because the Communistic question is beginning to get in here and will cause the disappearance of this court, and the absorption of the executive branches otherwise of the government, the disappearance of the things that I was trying to work toward."

And so we say the Government wholly failed to prove commission of any offense or attempt or any specific intent or even general intent to commit the offenses charged, while on the other hand defendant made proof that there never was in his mind any idea of disloyalty to his government or intent to interfere with its manpower or potential personnel.

In our judgment the Government failed to make proof against Hartzel of the crime charged.

V.

The Articles Written Before Pearl Harbor Were Erroneously Received in Evidence.

It is contended that the court erred in admitting in evidence the five articles written by Hartzel before Pearl Harbor over objection. They were irrelevant and incompetent and naturally prejudicial.

Three of these five articles were written by Hartzel in the year 1941, namely "The Blood Sacrifice" (Tr. 61); "Roosevelt's Illness" (Tr. 63), and "Revolution Will Come to America" (Tr. 69-75). These articles, together with two other articles found in Hartzel's trunk, the date of composition of one of which is unknown, were admitted in evidence on the theory that they were relevant to the issue of intent; but, when they are read they show that if we had been at war when they were written and mailed they would not have been any violation of the sedition law. "The Blood Sacrifice" is an article devoted exclusively to racial criticism. The article "Roosevelt's Illness", written in 1940 (Tr. 33), is a dissertation upon the well known illness of Mr. Roosevelt and interpreting that illness along psychological and political lines; "Roosevelt's

Infantile Paralysis" is another psycho-political article; "The Condition of Our Leader" is a third article dealing with the psychology of the President as influenced by his physical condition; the article "Revolution Will Come to America" was composed in 1941, and Hartzel said of this article:

> "I composed this in approximately January, 1941. This article was composed of two parts, the first part dealing with the tendency of this country toward war and hinting at the potential results thereof; the second part dealing with what he considered to be pertinent quotations from prominent personages." (Tr. 56-57).

When these documents are looked at from the viewpoint of our constitutional privilege, it is seen they are clearly within the limit of the right of free speech. War would not make them seditious and they were not relevant and not being relevant carried within them the virus of prejudice to the jurors' minds.

Prior to the war status these articles were entirely within the constitutional privilege and the assumption of a war status did not make these documents relevant to prove a felonious intent allegedly entertained in composing and mailing out other writings after the war began. If they were innocent compositions when written they were innocent when admitted and shed no guilty light upon subsequent events. True, the court told the jury he had allowed them in evidence on the question of intent. The court said:

> "There is one other thing that you must consider. Now another thing which I will refer to just now, some other documents have been admitted in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and

it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents here, mentioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army."

Notwithstanding the caution of this instruction we think the damage was already done and the impressions formed could not be eradicated from the jurors' minds.

VI.

It Was Error to Instruct the Jury That the Defendant Was Presumed to Intend the Natural and Probable Consequences of His Acts and Language in a Case Involving a Specific Intent.

It is contended that the court erred in instructing the jury as to the proof of the intent with which the documents were prepared and disseminated through Hartzel's mailing list.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific intention accompanied said acts" (Tr. 133-134).

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 138).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an

instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 145):

> "It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination: that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 145).

An Instruction in the Debs Case.

We call the attention of the Court to the following quotation from the opinion of this Court in the case of *Debs* v. *U. S.*, 249 U. S. 211, 216, as follows:

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effects to obstruct the recruiting service, etc., and unless the defendant had *the specific intent so to do in his mind.*" (Italics for emphasis.)

Mr. Chaffee, in his book on Freedom of Speech in the United States, has given studious consideration to the question here under discussion and he says in substance (p. 130) that where the statute which creates the crime expressly requires a specific intent, probability that the prohibited thing will come about is not the test of the guilt of the accused, and that presumption will not supplant the intent specified in the law itself. In other words, the *statutory* intent must be proved, not inferred.

The books furnish illustrations of the principle here involved. In *People* v. *Landman*, 103 Cal. 577, there was an indictment for an assault with intent to commit murder. The defendant was convicted and denied a new trial. The trial court had instructed the jury as follows:

> "Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant, at the time and place alleged in the information, voluntarily assaulted the prosecuting witness with a deadly weapon, in such a manner that the natural and ordinary consequences of such assault would be to kill the said witness Stanovitch, then the law presumes that the defendant intended to kill the said witness Stanovitch; and unless it appears from the evidence that the intention of the defendant was other than his acts indicated, the law will not hold him guiltless." (p. 579)

For the giving of this instruction the case was reversed in the Supreme Court, where the Court said:

> "In the offense here charged, a specific intent is the all-important element, and it is essentially a question of fact for the jury to decide. When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent; and therein is found the vice of the present instruction. The saving clause found in the latter portion of it does not cure the objection we have suggested. If it serves any purpose whatever it casts upon the defendant the burden of introducing evidence to disprove a state of facts created by a presumption of law, and no such burden can be cast upon a defendant in a case charging an offense of the present character. Of course, under these circumstances, a person's intent cannot be proven by direct and positive evidence, yet it is none the less a question of fact, to be proven like any other fact in the case, and all the circumstances surrounding the assault furnish the rule upon which its proper solution depends."

The same conclusion is reached in *Hibbard* v. *U. S.*, 172 Fed. 66.

Specific Intent Is Involved in the Means Alleged.

The allegation in the counts that the defendants wilfully did cause and attempt to cause insubordination, etc., and did wilfully obstruct, etc., is a charge that might be proven by various types of acts of the defendants. But the indictment goes on further and alleges a certain means through and by which it is said the defendants committed those crimes, *i.e.*, by publication and dissemination of certain articles which were by them *calculated and intended to induce* available and eligible persons to fail and refuse to enlist and submit to registration and *to cause* insubordination, disloyalty, mutiny and refusal of duty, etc. But the face of the documents do not bear out the allegations in the indictment so the Government had the burden of proving the specific intent alleged by other evidence *dehors* the documents.

The rule is that where the circumstances are such that the crime charged must have been done with a specific intent such intent must be alleged in the indictment and must be proved as alleged. (31 Corpus Juris 847, Sec. 461.) And where an offense may be committed in various ways the evidence must establish it to have been committed in the mode specifically charged in the indictment. (31 Corpus Juris 846, Sec. 460.)

The acts charged are said to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

There must be results, consequences, to be answered for, or one is not supposed to have intended the natural and probable.

But the rule as here applied by the Court was not adapted to the issue created by the Government's charges and was definitely misleading and suggestive of guilt, *i. e.*, the defendant was bound to intend, and hence, could not deny the consequences alleged.

The indictment in this case complies with the foregoing rule and sets out a special set of facts through which, it is alleged, the crimes charged were committed. The acts charged are said to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

Now the character of those allegations raises issues of *specific, actual, guilty* intent which the Government was bound to prove as laid. It was not enough to say that a presumption could be indulged from the face of *equivocal documents* and that from such documents defendants might be presumed to intend the natural and probable result of the language used. In a criminal case a specific intent is not to be presumed from the wording of equivocal documents. Extraneous evidence must be introduced, else the documents remain equivocal.

A simple illustration, we think will suffice. A defendant is charged with assault with intent to rob. It is shown in evidence that the assault was made and nothing more. The defendant goes free because it was not proven that he committed the assault with the specific intent charged. It would be error to charge the jury that the defendant was presumed to have intended the natural and probable

consequences of his acts for it is the intent that governs the guilt and makes the crime charged.

Intoxication to a degree of irresponsibility is a defense to assault with intent and other crimes where the act as charged is alleged to have been done with a specific intent in mind.

In the instance stated, of assault with intent to rob, the defendant, though intoxicated beyond possibility of mental intention to rob, could not interpose intoxication as a defense against simple assault itself on the ground of no specific intent to assault; but he could defend against a charge of specific intent to rob, on the ground of intoxication.

There are cases where it has been said that a defendant is bound to have intended the natural and probable consequences of his language used in a pamphlet but when examined it will be seen that the Court was holding that his language was so plain on its face that there was no doubt of the intention and the party was not heard to deny it.

The rule is really one of a type of estoppel commonly used in civil cases, where it is said that one is bound to intend the natural and will not be permitted to deny the obvious; as where the Court will not hear the plaintiff say that as he approached the crossing he looked and did not see the approaching train when if he had looked he must have seen. There it was.

But the rule as here applied by the Court was not adapted to the issue created by the Government's charges and was definitely misleading and suggestive of guilt, *i. e.*,

the defendant was bound to intend, and hence, could not deny the consequences alleged, *i. e.*, consequences assumed, by the form of the expression, to exist.

A Criminal Attempt Has No Results Except Failure.

And particularly we urge that the instruction was misleading and completely in error when we consider that Counts 2, 4 and 6 contained the allegation of a criminal attempt, that is, that defendant did cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces, as well as having actually caused those conditions in the service.

The books agree that there are three elements in the crime of attempt, (1) the intent to commit the crime; (2) doing of some overt act in part execution of the intent; and (3) failure to consummate the crime (16 Corpus Juris 113).

In proving an attempt to commit a crime, a *guilty* intent must be shown; and it must not only be shown that there was a guilty intent, but there must be a *specific* intent to do the particular thing (1 Bishop's New Crim. Law, p. 466; *Dahlberg* v. *People*, 225 Ill. 485, 488). "To convict one of an attempt to commit a crime, it is necessary to show that the overt act was done with the specific intent to commit that particular crime. Such an intent is essential." (16 Corpus Juris 113.)

As we interpret the holdings, this rule,—that one is presumed to intend the natural and probable consequences of his acts or language, as here said, has no application to criminal attempts for, in the law of attempt there are no consequences; there is only failure. Intent, act, failure.

All of which demonstrates that the law of specific intent is applicable to the crimes created by Section 33 when the crime is alleged to have been committed by printing, publishing and disseminating writings upon political and controversial subjects in which their purpose and intent is not on their face definitely stated by the writer to be the same purpose and intent alleged on the face of the indictment by the pleader.

The Means Alleged in an Indictment Must Be Proven As Laid.

It has always been held that the allegation of the means by which a crime is committed when there is more than one way of commission, is an essential part of the indictment, and being essential, must be proven as laid; and so it is that if the means by which a crime is alleged to have been committed requires a specific intent, a specific intent must be proven to have accompanied the act and shall not be presumed from the act itself; the step of logic is from cause to effect, and not from effect back to cause.

To illustrate that proof of the means alleged is essential and material, a look at *People* v. *Guedel*, 43 Ill. 226, will interest. There Guedel was acquitted of murder by *shooting* the victim with a gun and was promptly reindicted for the same murder of the same party by *beating* him with the same gun; and it was held on plea of the prior proceeding that the acquittal under the first indictment was no bar to a prosecution under the second. Means is material.

The Action of the Court Lessened the Degree of the Government's Proof.

We think the Court erred in weakening or lessening the degree of proof necessary to establish the Government's case. It alleged the crimes were committed by a means involving a specific intent and we say the Court should have held the Government to strict proof of its allegations, and not given it a short cut to a verdict by way of a presumption.

VII.

The Circuit Court of Appeals, in Affirming the Judgment, Has Usurped the Functions of the Jury By Deciding the Question of Specific Intent, a Question of Fact Upon Which the Trial Court Refused to Instruct the Jury, and Upon Which the Jury Did Not Pass for That Reason.

We think it obvious that the Circuit Court of Appeals invaded the province of the jury, for the reason that the trial judge refused to give to the jury the requested instruction as to the necessity of proof of a specific intent to do the prohibited acts, and the question of intent being a jury question, the defendant has not had his day in court upon it. The Circuit Court of Appeals by assuming to decide that fact usurped the function of the jury.

In effect the Circuit Court of Appeals has made itself the jury, has sat upon the rights of the defendant, and, as if it were the jury, has decided a question which the law has entrusted exclusively to the judgment of the jury; and has actually substituted the Court's judgment for

that of the jury; for upon that question of fact the jury should have been, but was not, permitted to pass.

We think this Court answered the question in the following quotation from the case of *Pierce* v. *United States*, 252 U. S. 239, 250, as follows:

> "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it *in the mode adopted*, and what were defendants' *motives in doing this*, were questions for the jury, not the court, to decide." (Italics ours.)

And we point out that what was there said was in a case where the documents were replete with statements having direct reference to the recruiting service which are quoted at large in the dissenting opinion at pages 256-264. There, with the documents full of violent language and distributed openly amongst persons likely to be affected, the Court yet considered that the matter was one for the jury, upon the intent. The reviewing court could there itself see the seditious nature of the documents upon their face and yet held that as the jury had the right to pass upon the question of intent involved, the Court would not disturb the judgment of the jury where it appeared that the jury *had passed* upon the intent with which the articles were distributed.

But how different the *Pierce* case is from this case;—there the jury had passed upon the intent where the documents were full of denunciations of drafting and recruiting of sons as they grew to soldier size, distributed among the prospective personnel of the armed forces; so the high court would not undo what the jury had advisedly done. There the Court did not interfere with the right of the jury to pass upon the question of intent, but held it to be the province of the jury so to do, and that the jury *had done so.*

Here the pamphlets were distributed by letter to persons of intelligence, which pamphlets, when examined, make no direct reference to the military or naval forces or the recruiting or enlistment service of the United States; whereas, in other cases cited on hearing, there was specific reference upon the face of the documents from which specific intent could be found, and in none of which was this question raised.

But here the specific intent of the defendant was not permitted to reach the jury upon the question of the circulation of articles having no reference to the armed forces or the service; and the Circuit Court of Appeals affirmed the action of the trial judge in denying that right; yet almost in the same sentence, saying that the defendant has that right.

Now it will be noted that there is a wide difference between telling a jury that a defendant might be *presumed* to intend the natural and probable *result of language used* and telling the jury that the acts of a defendant in such case as this must be done *with an actual specific intention* in mind to commit the *offenses charged in the indictment;* one is general intent, the other specific intent.

A Specific Intent Cannot Be Presumed From Consequences Where There Are No Consequences.

The specific intent must come first in point of order as, in attempts, or acts done with intent, there are no results (except failure) to be responsible for.

Where the act itself does not *inherently* carry with it the proof of a specific intent a specific intent must be shown by independent proof to have accompanied the act.

Consequences must be in the mental contemplation and purpose of the offender when he does the act; but that is to be proven, not *presumed from consequences,* for there are no consequences from which to draw a presumption.

So we say that in affirming the judgment, the Circuit Court of Appeals denied the right of trial by jury upon a controlling question of fact in the case, and usurped the functions of the jury to decide the question of fact itself.

Conclusion.

Wherefore we respectfully suggest that the judgment appealed from should be reversed.

All of which is respectfully submitted.

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